

25 January 2012

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Dear Sir/Madam

Consultation Paper – “Review of not-for-profit governance arrangements” 9 December 2011

Thank you for the opportunity to provide the Not-for-Profit (NFP) industry’s views on the review of not-for-profit governance arrangements proposed in the Treasury Consultation Paper released on 9 December 2011.

1 About Moore Stephens

1.1 We are writing on behalf of the Moore Stephens Australia network of eight independent firms of business advisors and chartered accountants. Moore Stephens have a real understanding of the environment in which our clients operate. We currently service a diverse range of entities within the sector and specialise in providing assurance, accounting, tax and advisory services to our NFP clients. We provide a national service offering to a number of key clients operating in the Not-For-Profit sector, including the following:

- Religious organisations
- Large charities
- Football clubs and sporting associations; and
- Universities and many TAFE colleges in Australia.

1.2 We have had a long standing commitment and involvement for the past 50 years in this sector. We have been active in recent years in providing submissions to the Government’s various committees and consultations to support the sector through this reform phase.

2 Feedback and Comments

2.1 Our submission is to be read in conjunction with our submission on the legislation exposure draft and explanatory materials.

General comments

2.2 As a network, we support overall the underlying objectives of the proposed reform to the sector as demonstrated by our submissions to various committees, consultation papers and exposure drafts over the past few years.

2.3 The not-for-profit sector is a large and significant contributor to the Australian society. Without its contribution and particularly that of charities it would be difficult to see how the private and government sectors would be able to meet the needs of those within the community which benefit greatly from the sector’s efforts.

- 2.4 We acknowledge that the current environment is at times complex, cumbersome and adds to the burden these organisations are placed under to meet their mission and objectives. The proposed reforms seek to address these issues and to assist in improving the level of service to the recipients of not-for-profit organisations.
- 2.5 The governance of these organisations is essential to ensure that stakeholders have an ability to rely on the compliance framework to ensure that the mission and objectives of the various organisations are carried out appropriately.
- 2.6 The not-for-profit sector contributes to society greatly due to its ability to be nimble, agile and cost effective. Organisations at both ends of the size spectrum are established to meet wide sweeping, as well as specialised or niche needs of society. It is important in any discussion of regulatory, mandated governance arrangements to ensure that there is a balance and a net benefit to the community of the changes to occur.
- 2.7 In our brief consultations with some of our clients and contacts in this sector, there have been concerns that excessive changes, increased compliance and over regulation may result from these reforms which may potentially result in shrinkage of the sector, in particular with small charities and not-for-profits by simply being incapable of practically complying with the new reform.
- 2.8 Furthermore, there is a view that the pool of those willing to volunteer or to accept appointments in these organisations will shrink in the short to medium term if obligations and responsibilities are excessive and compliance costs are significant. Donations and member contributions may also be impacted as the motivating factor to ensure donated funds are channelled to the mission may be diminished by the increased costs of maintaining compliance.
- 2.9 In this context, we look to the level of regulation and mandating of governance arrangements as discussed in the consultation paper.
- 2.10 This sector is a diverse one with a range of stakeholders, beneficiaries and interested parties which at times can almost be seen as unique in each case. Therefore this raises the inevitable issue of how to overlay a regulation and governance framework on a diverse sector.
- 2.11 It is our view that “one size fits all” approach to governance is not appropriate. The existing evolution of the range of types of entities utilised by the sector currently indicates that this is not the case. There is however a need to determine the level of governance that best fits.
- 2.12 We would recommend that when considering the governance arrangements we look to a differential approach, not dissimilar to that in the corporate environment. The level of governance requirements for an ASX listed company is clearly distinguishable from a sole director or sole shareholder. This, combined with the reporting entity concept, sets the scene.
- 2.13 We have identified four major factors or indicators which could be used to differentiate governance requirements. (It is our view that size is a secondary consideration to the governance criteria).
- 2.14 The degree of governance required can be determined by the order of the following:
- Does the organisation solicit or obtain funds from the general public (who are not affiliated or who are outside its immediate circle) and/or for which the general public or specific donors are able to receive a tax deduction for the payment?
 - Does the organisation receive funding or support such as grants funding from government organisations, private ancillary funds or organisations covered in 1 above?
 - Does the organisation receive tax concessions (beyond general income tax exemptions)?

- Does the organisation receive mutual income or income from a section of the public which are affiliated or within the immediate circle of the organisation and for which no tax deduction is available?
- 2.15 On this basis we would suggest that there should be different levels of governance for each type of organisation based on the above.
- 2.16 We propose the above questions/framework as a consideration in determining the appropriate level of governance arrangements.
- 2.17 Furthermore, we provide responses to the questions posed by the consultation paper below. These comments have been made on the basis that no changes to the classification of the reporting requirements under the proposed legislation have been made.

3 Response to specific questions

Question 1

Should it be clear in the legislation who responsible individuals must consider when exercising their duties, and to whom they owe their duties to?

- 3.1 It is our view that the legislation concerning whom must be considered for the duties of responsible individuals and to whom these duties are owed to should be limited to a principle based approach. This is to ensure that the responsible individuals have the flexibility to consider their duties within the broad concept of stewardship and accountability applicable to their organisation and environment.
- 3.2 Furthermore, to fix these considerations in legislation may pose difficulties with existing organisations and structures where through affiliations and related rules, ex officio status or even other legislative requirements, a responsible individual may be faced with significant conflicts of these duties under a prescriptive approach.

Question 2

Who do the responsible individuals of NFPs need to consider when exercising their duties? Donors? Beneficiaries? The public? The entity? Or mission and purpose of the entity?

- 3.3 Whilst one could say that the principal duty of a director is to maximise shareholder's wealth, the principal duty of the not for profit officeholder it is maximise the benefit of the purpose/mission of the entity (wealth) for those interested parties (shareholders).
- 3.4 For all bona fide not-for-profit organisations, the raison d'être for the organisation is its "mission", purpose and objectives. These should be the fundamental and primary considerations for any responsible individual when exercising their duties.
- 3.5 It is our view that beyond the consideration of the mission, legal and compliance obligations, the extent to which responsible individuals should consider other stakeholders will depend on the nature of the organisation and the mission itself.
- 3.6 For example, responsible individuals of an organisation with a Public Benevolent Institution style mission and objectives will have a significantly wider range of potential stakeholders to consider when exercising their duties than an industry promotion group.

Question 3

What should the duties of responsible individuals be? And what core duties should be outlined in the ACNC legislation?

- 3.7 Through this process of reform, there have been a number of parallels made between existing frameworks and the proposed NFP framework. We refer to the commentary outlined in

paragraphs 84 – 103. We support the principle based approach outlined in paragraph 102. The duties of:

- i) care and due diligence,
- ii) reasonable care and skill,
- iii) not to improperly or misuse information or position and disclose and manage conflicts of interest

appear a reasonable basis for core duty.

Question 4

What should be the minimum standard of care required to comply with any duties? Should the standard of care be higher for paid employees than volunteers? For professionals than lay persons?

- 3.8 We make our comments in the context of issues raised in our response to the exposure draft legislation regarding responsible individuals. We have assumed that these drafting concerns are addressed in making these comments.
- 3.9 As a general proposition it is reasonable to have a higher level of care for professionals than lay persons. This is supported by common law and other legislative pronouncements. Due consideration would need to be given to ensure that a higher standard of care would be limited to the responsible individual's area of expertise.
- 3.10 We do not consider that by virtue of remuneration a higher duty of care is owed. Other considerations such as capacity, ability and experience are more relevant determinants of a higher level of care than the fact that one is being remunerated. This distinction may also be problematic in circumstances where the responsible individual also participates in the management of the organisation. For example, a CEO which is an ex officio director of a company limited by guarantee should not be held to a higher standard of care in carrying out their responsible individual duties than another responsible individual with similar professional background solely by virtue of the fact that one is remunerated by the organisation and one acts in a voluntary capacity.
- 3.11 We do not perceive that a distinction between voluntary and paid will result in increased numbers of individuals agreeing to take on roles as responsible individuals as volunteers. In our view, this distinction could indeed lead to greater uncertainty and therefore greater reticence to take on these roles whether paid or unpaid.
- 3.12 Again, with all reform changes, we recommend that the ACNC undertake a predominately educational and supportive role to the sector to ensure that responsible individuals are in a position to properly and effectively undertake their roles.
- 3.13 Furthermore, the introduction of a higher duty of care may result in indemnity related issues and personal liability related issues for professionals and other responsible individuals (We refer to our comments on insurance below).

Question 5

Should responsible individuals be required to hold particular qualifications or have particular experience or skills (tiered depending on size of the NFP entity or amount of funding it administers)?

- 3.14 The nature of this sector is diverse and ever changing. We are of the view that in the short term, it would be inappropriate for consideration of the holding of particular qualifications for responsible individuals. Indeed the mandating of any such a requirement would have a negative impact on the sector.
- 3.15 Rather, we look to the existing compliance and legislative frameworks currently in place. Many organisations operate in highly regulated environments such as hospitals, aged care facilities where particular qualifications, skills and experience are pre requisites for operation

and government funding. In this context we see no value at the current time to extend beyond this.

- 3.16 We also understand that some state government ministries are developing educational programs for entities which receive their funding to promote good governance both through and in the completion of these programs as well as the promotion of best practice guidelines and resource materials to assist with the evolution of the governance arrangements with these organisations.
- 3.17 We recommend that the ACNC give consideration to these existing programs and governance education programs (provided by organisations such as the Australian Institute of Company Directors) as a basis for the development of a supportive approach to education on governance matters. These programs could form the basis of accreditation requirements for responsible individuals of appropriate organisations, once the sector has dealt with the other major limbs of the reform agenda.
- 3.18 We refer to our comments concerning size (solely) as a blunt instrument and at times a wholly inappropriate measure for differential governance arrangements which are outlined in the general comments of this paper.

Question 6

Should these minimum standards be only applied to a portion of the responsible individuals of a registered entity?

- 3.19 We refer to our comments on Question 5 and consider that in the medium to long term, this may be an appropriate mechanism to achieve standard requirements without placing unnecessary burdens on organisations. Due consideration would need to be made in relation to what, if any, additional responsibilities this would place on the responsible individual that meets the standard as well as what mechanisms would be available to them to extinguish their duties in this context and where other qualifications or experience can be recognised.

Question 7

Are there any issues with standardising the duties required of responsible individuals across all entity structures and sectors registered with the ACNC?

- 3.20 We refer to our comments above. There are a range of circumstances which have resulted in the diversity of entities within this heterogeneous sector. Obligations and duties under existing legislation, formation documents, cultural and customary practices all result in a complex environment in which to standardise these duties.
- 3.21 It is our recommendation that the ACNC seek to provide best practice guidelines and frameworks to enable organisations to adopt an improved governance approach based on a principle approach. This supports the underlying need to standardise/improve the transparency and accountability of the sector without placing undue cost and compliance burdens for which the ACNC in part was established.

Question 8

Are there any other responsible individuals' obligations or considerations of other issues (for example should there be requirements on volunteers?) that need to be covered which are specific to NFPs?

- 3.22 The structure of the governance framework needs to support and encourage engagement and participation of the general public and interested parties in the mission and objectives of this sector.
- 3.23 To encourage this participation not solely by financial means (ie donations) but through the access to the skills and experience of those who participate in commercial and other sectors is an important consideration. An overly burdensome and complex set of obligations and

requirements for this will discourage these types of participation and should be considered when formulating the governance arrangements.

Question 9

Are there higher risk NFP cases where a higher standard of care should be applied or where higher minimum standards should be applied?

3.24 There would be cases where there would be a higher standard of care. However, in our view these are covered under existing differential legislative standards currently in place. For example, NFP providing aged care or nursing services, already have in place compliance and duty of care standards legislated. Those who are seeking funds from the community are currently covered under the Charitable Fundraising Acts therefore there needs to be a reference to these existing pieces of legislations and their harmonisation at a Federal level.

Question 10

Is there a preference for the core duties to be based on the Corporations Act, CATSI Act, the office holder requirements applying to incorporated associations, the requirements applying to trustees of charitable trusts, or another model?

3.25 In the context of the mission and objectives of these organisations being the primary consideration for governance. We are of the view that the duties of trustees under various Acts and common law principles would be a preferred model.

Question 11

What information should registered entities be required to disclose to ensure good governance procedures are in place?

3.26 That Governance model/principles are in place. Reporting of number of meetings and the qualifications and experience of the responsible individuals for those medium and large entities.

Question 12

Should the remuneration (if any) of responsible individuals be required to be disclosed?

3.27 The disclosure of remuneration in the corporate context is limited to ASX listed entities. We see no value to the sector for the disclosure of remuneration to the general public. The utility of this information is questionable in the public forum. Charitable fundraising acts and other existing compliance requirements including Accounting Standards appropriately address these issues.

Question 13

Are the suggested criteria in relation to conflicts of interest appropriate? If not, why not?

3.28 In general these are reasonable, there may however, be certain circumstances or situations where it may be possible that all parties will be subject to a conflict of interest. This for example may occur in entities which provide disability services or native title holder organisations where all responsible individuals are linked to the organisation and a relative is a recipient of the services of the entity and therefore there may be a conflict. In these circumstances there may be an argument for the constitution of the board to include at least one member which does not have a relative which receives the services of the entity.

3.29 There is also an issue in religious organisations, where religious may hold by their very nature what could be perceived as an inherent conflict of interest. We refer to the following comments referred to in the Explanatory Materials. This particularly is relating to the comment in the "Explanatory Materials" that "the personal interests of a responsible individual member and those of associated individuals, must not be allowed to take precedence over those of the entity generally".

Question 14

Are specific conflict of interest requirements required for entities where the beneficiaries and responsible individuals may be related (for example, a NFP entity set up by a native title group)?

See answer to Question 13

Question 15

Should ACNC governance obligations stipulate the types of conflict of interest that responsible individuals in NFPs should disclose and manage? Or should it be based on the Corporations Act understanding of 'material personal interest'?

- 3.30 The Corporations Act understanding of material personal interest is a somewhat stable and well defined concept. Given the complexity and breath of the sector, we would recommend that the disclosure should be based on the Corporations Act requirements.
- 3.31 As with all governance guidelines, these should then be reviewed and altered if there is a substantive need.

Question 16

Given that NFPs control funds from the public, what additional risk management requirements should be required of NFPs?

- 3.32 It is the responsibility of the governing board to undertake duties appropriate in this respect. Given the diversity the sector it is not appropriate for further requirements to be legislated.

Question 17

Should particular requirements (for example, an investment strategy) be mandated, or broad requirements for NFPs to ensure they have adequate procedures in place?

- 3.33 Our preliminary consultation with stakeholders has indicated support for the documentation and consideration at board level of the investment strategies of organisations which hold reserves and/or significant investments funds.
- 3.34 We recommend that these requirements should be reviewed annually by the responsible individuals of the entity and that the ACNC develop best practice guidelines to assist the sector in addressing these areas, rather than put such requirements in legislation.

Question 18

Is it appropriate to mandate minimum insurance requirements to cover NFP entities in the event of unforeseen circumstances?

- 3.35 Insurance in general is effective as part of an overall risk management approach. The general comments made in paragraph 136 and 137 are supported. However, we do not recommend the mandating of minimum requirements due to a range of factors, including cost, availability of insurance and the diversity of the insurance needs of the sector.
- 3.36 We recommend that the responsible individuals be required to review the appropriateness of insurance coverage and that the ACNC develop practice guidelines to assist the sector in addressing these areas, rather than mandating insurance.

Question 19

Should responsible individuals generally be required to have indemnity insurance?

- 3.37 Our position is similar to that outlined in our response to Question 18.
- 3.38 Furthermore we recommend, as part of any support measures, that the government consider the provision of low cost insurance options for the sector or facilitate the development of these style of products.

Question 20

What internal review procedures should be mandated?

- 3.39 None. This is an issue for those who govern each individual NFP to consider.

Question 21

What are the core minimum requirements that registered entities should be required to include in their governing rules?

- 3.40 There needs to be a transitional mechanism to avoid the unnecessary expense to existing entities of changing their existing governing rules. Should the existing rules be required to be amended we anticipate that some entities will have a range of issues to be dealt with.
- 3.41 The replaceable rules and the Incorporated Association's standard rules have worked well in practice since their introduction. There is usually a range of rules which reflect the type of organisation that is being established. For example, the deed of a trust and the constitution of an incorporated association by their very nature have different and appropriate rules. However, we would recommend the introduction of key replaceable rules which can be adopted wholly by new entities based on each structure or selectively adopted should existing entities wish to amend their governance procedures.
- 3.42 Key rules regardless of entity should include but not be limited to:
- Prohibition on distribution of profits;
 - Rules regarding the entity's mission;
 - Meetings;
 - Rights and obligations of responsible individuals and procedures surrounding their appointment and resignation;
 - Wind up provisions; and
 - Conflict resolution.

Question 22

Should the ACNC have a role in mandating requirements of the governing rules, to protect the mission of the entity and the interests of the public?

- 3.43 There are currently a range of legislation and court mechanisms to ensure compliance with the governing rules. The regulator's role should be limited to streamlining the external mechanisms available for recourse. Under the proposed current legislation, the regulator will have powers to deregister the status of the entities amongst other quite significant powers. Any further powers in relation to mandating the requirements of the governing rules do not appear to have a cost benefit to them.

Question 23

Who should be able to enforce the rules?

- 3.44 Existing mechanisms are available and should be sufficient.

Question 24

Should the ACNC have a role in the enforcement and alteration of governing rules, such as on wind-up or deregistration?

- 3.45 For cost effectiveness, we would recommend that there be limited involvement by the ACNC where there is a wind up or alternation of the rules beyond notification of the wind up of the entity.
- 3.46 The existing powers available under the exposure draft establish an appropriate role for ACNC particularly considering that there existing legislative powers available for each structure recognised.

Question 25

Should model rules be used?

- 3.47 We refer you to our response to Question 21.

Question 26

What governance rules should be mandated relating to an entity's relationship with its members?

- 3.48 We refer to our previous comments and we consider little value in mandating requirements beyond the need for an annual meeting of members.

Question 27

Do any of the requirements for relationships with members need to apply to non-membership based entities

- 3.49 Non membership based entities should by their very nature have more limited obligations than membership based entities. We do not consider there is a need to extend member relationship requirements to these entities.

Question 28

Is it appropriate to have compulsory meeting requirements for all (membership based) entities registered with ACNC?

- 3.50 As a general principle, we support an annual meeting requirement.

Question 29

Are there any types of NFPs where specific governance arrangements or additional support would assist to achieve in better governance outcomes for NFPs?

- 3.51 We are of the view that it would be appropriate for the responsible individuals to make an annual declaration that the organisation is complying with its mission and objectives. What matters and the extent of support required to enable this declaration to be signed can be developed utilising a principles and guidelines approach.

Question 30

How can we ensure that these standardised principles-based governance requirements being administered by the one-stop shop regulator will lead to a reduction in red-tape for NFPs?

- 3.52 If the governance rules are truly to be principle based and limited to the broad matters outlined in our views above, it would be the responsibility of those governing an NFP to determine how they are administered. We do not see this as being in conflict with the "one-stop shop" objective. Nevertheless, as set out in our submission in respect to the Exposure Draft we fail to see how the proposals will achieve this "one-stop shop" objective without placing an enormous burden on NFPs.

Question 31

What principles should be included in legislation or regulations, or covered by guidance materials to be produced by the ACNC?

3.53 Refer to our earlier comments.

Question 32

Are there any particular governance requirements which would be useful for Indigenous NFP entities?

3.54 No comment.

Question 33

Do you have any recommendations for NFP governance reform that have not been covered through previous questions that you would like the Government to consider?

3.55 None.

If you have any queries please contact me or any of the contributors to this submission:

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Yours faithfully



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